

TESTIMONY OF
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HEARING ON
THE LAW OF THE LAND:
U.S. IMPLEMENTATION OF HUMAN RIGHTS TREATIES

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

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Introduction

Chairman Durbin, Ranking Member Coburn, and Members of the Subcommittee, thank you for convening this important hearing. I appreciate the opportunity to be here today to share our perspective on the human rights implementation agenda. We are profoundly grateful to you, Mr. Chairman, for your leadership on so many key human rights issues and, in particular, for the central role you played in creating this Subcommittee on Human Rights and the Law. We believe the Subcommittee's work signals an important new attitude towards human rights enforcement in the United States and will help educate Americans about the rights to which they are entitled and ensure that the United States Government views its human rights treaty commitments as a regular part of domestic law. This is what our Constitution requires, and so it is particularly fitting that the Judiciary Committee is able to exercise jurisdiction over these issues. In the many years since the United States began ratifying human rights treaties, this is the first hearing explicitly focused on implementation and enforcement of those obligations. We hope it is the first of many.

I also want to welcome the attention of the government witnesses to these issues as well. Congress could have no better partners in this implementation effort than Assistant Attorney General Tom Perez and Assistant Secretary Mike Posner. Each has a deep understanding of the importance of these issues and an extraordinary commitment to making human rights a reality. We look forward to continuing to work together with them and with you Mr. Chairman, to advance this agenda.

Eleanor Roosevelt, the mother of the international human rights movement, famously said: "Where do universal human rights begin? In small places, close to home. So close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works." The human rights treaties to which the United States is a party—on civil and political rights, torture, and racial discrimination—are intended to protect people "close to home" against government abuses of their rights. They are, under our Constitution, part of "the supreme law of the land." But most Americans have never heard of them, nor have the executive agencies that have—or ought to have—protection of these rights as part of their mandate. Historically, the United States Government has confined the examination of human rights issues to the State Department, where they have been treated as a matter of foreign policy. For many years, Congress largely took the same approach, limiting jurisdiction over these issues—as human rights issues—to the committees which oversee the State Department and foreign relations.

That approach misses Eleanor Roosevelt's point. Human Rights First has long argued that all three branches of the United States Government must understand human rights laws as part of our domestic law, and that Congress and the Executive Branch should work together to bring these obligations into the mainstream of the domestic agencies with primary jurisdiction over their subject matter. President Clinton broke new ground in this direction with a 1998 Executive Order 13107 on the Implementation of Human

Rights Treaties, issued on the 50th anniversary of the Universal Declaration of Human Rights. The Executive Order created an inter-agency working group that brought together the domestic agencies charged with implementing human rights treaty obligations and charged them with ensuring that executive branch policies comported with those obligations. The working group continued under President Bush, coordinating efforts to report on U.S. compliance with various treaty obligations.

This Subcommittee is an important congressional piece of the effort to bring human rights home. The Subcommittee has brought much-needed attention to the legal framework on key issues such as human trafficking, the use of child soldiers, corporate responsibility, the use of rape as a weapon of war, and accountability for genocide and crimes against humanity. In the tradition of human rights treaty ratification in the United States, which has had broad bipartisan support over many years, the Subcommittee has brought together Senators from both sides of the aisle to achieve concrete results in human rights enforcement. With strong bipartisan support, the Subcommittee successfully shepherded into law two important pieces of legislation—the Child Soldiers Accountability Act and the Genocide Accountability Act—that will enable the U.S. government to prosecute perpetrators of some of the most egregious human rights violations. And thanks to Senator Durbin’s leadership, this accountability agenda will now have an institutional home and funding to implement these enforcement responsibilities.

A Practical Implementation Agenda

Last week we celebrated the 61st anniversary of the Universal Declaration of Human Rights. Drafted under the leadership of Eleanor Roosevelt, the Declaration is the foundation document setting out the principles that the human rights treaties are intended to operationalize as the standards by which to judge governments. As a human rights organization based in the United States, and in recognition of the leadership role the United States plays on these issues internationally, we have focused particular attention on ensuring that the United States lives up to these obligations. Ensuring compliance with human rights treaty obligations will strengthen U.S. efforts to advance human rights abroad. As Secretary Clinton said in her human rights speech at Georgetown on Monday, we must lead by example. There is no substitute for U.S. global leadership on human rights. Without it, the human rights agenda falters, repressive governments operate with greater impunity, and the very fabric of the norms enshrined in the Universal Declaration frays. When the United States violates these norms—or sets them aside for expediency’s sake—the global consensus erodes. And, as President Obama said in Oslo last week, “we honor those ideals by upholding them not when it’s easy, but when it is hard.”

My objective today is not to measure the distance between those ideals and our current reality but rather to offer a framework for ensuring greater fidelity to them in the future. Our 30-year history of working on these issues tells us that U.S. adherence to these standards would be significantly enhanced by three things: first, an active and transparent structure within the Administration to evaluate implementation of these obligations and advance changes designed to improve compliance; second, robust congressional

oversight of that process; and third, a strategy, based on interagency cooperation, for deploying U.S. experience and expertise to advance solutions to shared human rights problems abroad. In addition, there is an important education agenda to correct misinformation and misunderstanding among the various stakeholders—the different administrative agencies, state and local governments, civil society organizations, and the media—about the status of international human rights treaties as domestic law and the obligation of the United States to implement and abide by them.

I. Executive Branch Structures to Enhance Compliance

While the previous two administrations have made important strides in greater interagency coordination around human rights treaties, these efforts have largely focused on information gathering and reporting to UN treaty bodies and answering international inquiries about U.S. policies and practices. This work is clearly important; we need to demonstrate responsiveness to the bodies charged with overseeing state compliance with international treaty obligations, both to reinforce the importance of these mechanisms themselves and the norms behind them, and because we must have an honest assessment of our progress towards implementation of human rights obligations in order to move forward.

But an agenda of real change requires much more than reporting on past compliance. In order to operationalize the constitutional vision that these treaty obligations are truly the law of the land—and to make progress towards full implementation—we need a structure in place to educate, monitor and advance progressive realization of these rights.

In particular, we recommend that the administration develop interagency structures and mechanisms designed to:

- Ensure that legislation proposed by the administration and legislation on which the administration takes a position is vetted for conformity with human rights treaty obligations.
- Educate state and local government officials and the broader public about their rights and responsibilities under human rights treaties.
- Develop and execute a plan to monitor law, policy, and practice at the state level to assess conformity with human rights obligations.
- Conduct an annual review of all reservations, understandings, and declarations associated with U.S. ratification of human rights treaties with an eye towards their eventual elimination.
- Ensure that the domestic agencies with jurisdiction over human rights issues have a point person who understands the content and legal standing of the treaty requirements and can engage meaningfully in an interagency process to achieve these objectives.

One early test of the efficacy of such a structure will be the Universal Periodic Review (UPR) of the United States conducted next year in the UN Human Rights Council. Because the UPR considers the records of all states and encourages consultation between the government and civil society groups as a part of the process, the UPR is one of the few activities of the Human Rights Council that has the potential to advance protections for human rights in a practical and meaningful way. In practice, the record has so far been mixed, with some states taking the process more seriously than others.

The UPR of the United States provides an excellent opportunity to demonstrate the commitment of the United States to uphold its international treaty obligations and to advance a better understanding of those obligations by domestic government agencies and the broader public. It also will enable the United States to set the bar high for other states in relation to how they conduct themselves in their own reviews. In order to accomplish this, the process should be transparent and inclusive, including consultations open to civil society groups in regions throughout the country. Although the Department of State is taking the lead, it should bring other government stakeholders—including federal, state, and local agencies as well as Members of Congress—into the consultation process. State and local human rights commissions and similar bodies across the country could be effective partners in this effort, which should include consultations in the UPR preparation as well as the follow-up and implementation of recommendations coming out of the process. Most importantly, the consultations must be more than just talk and should result in concrete actions to demonstrate that the United States—as promised by Secretary Clinton in her speech earlier this week—is holding itself accountable to universal standards.

II. Robust Congressional Involvement

While the treaty ratification process has traditionally been the province of the Senate Foreign Relations Committee, this subcommittee can add an important perspective in that process. Indeed, the manner in which human rights treaties have been ratified in the past has undermined the concept that these rights are intended to apply—and be enforced—here at home. When the Executive Branch asks the Senate ratify a human rights treaty, it sends along a companion package of reservations, understandings, and declarations designed to ensure that the treaty effects virtually no change in domestic law and practice. Lawyers at the State Department, with some help from the Department of Justice, go through the treaty’s provisions with a fine tooth comb, comparing its requirements to state and federal law and practice. If there is any conceivable contradiction, the United States exempts itself from compliance. For provisions where there’s no outright contradiction, the United States complies only to the extent that the treaty is congruent with, but not broader than, existing U.S. law. Then, as added insurance, the United States declares that the treaty is “non-self-executing,” to avoid having the treaty create private rights enforceable in U.S. courts.¹

¹ In the rare instance when a treaty absolutely requires changing domestic law, the United States has found ways to limit and pervert that implementation. In the case of the Convention against Torture (CAT), for example, signatories are required to explicitly outlaw torture. But the law Congress eventually passed to

There are other models of treaty ratification and implementation that seek to weave these obligations into the fabric of domestic law and practice, through the political process and by public education. When Canada considers a treaty, for example, it engages in a lengthy process of consultation; provinces are invited to identify possible reservations to the treaty where it conflicts with local law. The process is used both to get buy-in from the provinces and to educate local officials about the treaty's requirements. Once ratified, jurisdiction over the treaty's implementation and monitoring shifts to Canada's department of justice, which deals with individual complaints about violations and vets proposed legislation for conformity with the treaty's requirements. Australia, meanwhile, reaches out to its states through its Human Rights Working Group of the Standing Committee of Attorneys General, and the Parliamentary Standing Joint Committee on Treaties in the federal parliament holds public hearings.

Today's hearing is an important beginning to raise awareness about the content and legal status of our human rights treaty requirements. We urge this committee to play an active role going forward. This Subcommittee should consider holding regular oversight hearings on the interagency agenda we set forth in this testimony. In particular, we urge this subcommittee and other relevant committees of the Congress to:

- Conduct oversight hearings in which the administration can report back on its efforts to engage a broad range of stakeholders in the UPR process.
- Participate in the U.S. UPR consultations and on the delegation to the Human Rights Commission.
- Hold a hearing on the recommendations coming out of the UPR process.
- Oversee the administration's progress in implementing mechanisms for future compliance outlined above.
- Meet with parliamentarians from other countries—in particular those that have a federalism structure—to share their experiences and best practices for advancing human rights implementation.

These efforts should not be limited to this Subcommittee. A robust implementation effort in the Congress will include a wide range of actors and committees with jurisdiction over the subject matter of the human rights treaties to which the United States is a party. For

prohibit torture applies only to conduct outside the United States. Ironically, the previous administration relied on this extraterritorial-only provision to argue that the abuses at Abu Ghraib, because they took place in U.S.-occupied territory in Iraq, were exempt from prosecution under the federal anti-torture statute. Similarly, the declaration attached to the CAT, limiting the scope of the prohibition on cruel, inhuman and degrading treatment to conduct that violates the ban on cruel and unusual punishment under our Constitution was perversely interpreted by the previous administration to assert that the U.S. was not bound by the ban when it acted against non-U.S. nationals abroad.

example, the Committee on Armed Services should evaluate U.S. compliance with the protocol on children in armed conflict; the Subcommittee on Immigration should conduct hearings into U.S. compliance with the requirements of the refugee convention's protocol, particularly in the areas of detention and access to asylum.

III. Strengthen U.S. Leadership and Effectiveness to Advance Human Rights Abroad

Upholding international treaty obligations at home also strengthens U.S. efforts to advance universal human rights protections globally, by making it clear that the United States holds itself to the same standards to which it holds other governments. The failure to do this in the past has weakened U.S. influence in several foreign countries, in particular those countries like China, Russia, and Egypt that assert a strong security imperative to justify the curtailment of rights. Failure to respect human rights in these countries has not contributed to the resolution of conflicts or strengthened national security, but it has created human suffering, sometimes on a massive scale. We need to reverse this trend of diminished U.S. ability to combat violations of human rights abroad and one way to do that is to be seen to implement our international obligations at home.

An active and transparent structure within the Administration to evaluate implementation of international human rights treaty obligations – along with robust congressional oversight of that process – will set a positive precedent for other countries. The United States could advocate such an arrangement with other states to encourage greater efforts to bring their policies and practices into compliance with international treaty obligations. Civil society participation in such a U.S. structure could also serve as a model of the type of interaction between government and civil society that the United States has long advocated in other countries.

Interagency cooperation to uphold international obligations at home has an additional impact on U.S. effectiveness to promote human rights abroad. The United States has extensive experience and expertise in many areas of human rights protection. Interagency cooperation on implementing international obligations at home can provide a framework to deploy fully that expertise abroad, both through bilateral and multilateral relationships.

An example of this is bias motivated violence, a problem shared by many countries throughout the globe, including the United States.

Since 2002, Human Rights First has sought to reverse the tide of racist, antisemitic, xenophobic, anti-Muslim, homophobic, and other violent bias crimes internationally, in particular in Europe and the former Soviet Union. During this period, the United States has led efforts to confront hate violence through its foreign policy and through engagement in multilateral institutions such as the Organization for Security and Cooperation in Europe (OSCE).

Now, following passage of the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, the United States has a renewed authority to encourage other nations to

toughen their own laws and policies in response to violent hate crime. In addition, the United States can offer technical and other forms of assistance to promote training and sharing best practices in the areas of hate crime data collection, investigation and prosecution of hate crime incidents, and strengthening cooperation between local law enforcement, targeted communities and civil society leaders.

We recommend that the Departments of State and Justice, as part of their joint efforts to implement human rights treaty obligations at home, establish a mechanism to share abroad U.S. best practices and expertise on strategies to guarantee civil and political rights, including combating violent hate crime.

Conclusion

We welcome the Subcommittee's attention to these issues and pledge to work with you to ensure that respect for human rights is a conscious agenda in all branches of our government. Success will ensure not only a deeper understanding of the rights inherent in all people but presents an opportunity for the United States to view human rights as Eleanor Roosevelt did—close to home, and relevant to all Americans. Thank you.